Malaysian French Bank Bhd & Ors v Joo Seng Rubber Co Sdn Bhd (in receivership) & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7–24–2166–89
LIM BENG CHOON J
27 AUGUST 1991

Banking *— Banker and customer — Bank's retention of customer's securities — Bank transferred right to securities to third party — Bank surrendered banking licence — Bank retained securities after transfer and surrender — Whether bank's retention of securities was lawful*

Banking *— Banks and banking business — Banking licence — Discretion of Minister to issue licence — Whether Minister's discretion could be questioned — Banking Act 1973 s 3(1)*

Banking *— Banks and banking business — Banking licence — Validity — Licence issued but not published in gazette — Whether statutory provision requiring such publication directory or mandatory — Banking Act 1973 s 13(1)*

The first respondent, Joo Seng Rubber Co Sdn Bhd created, inter alia, a debenture over its assets in favour of Banque De L'Indochine ('the existing banque') so as to secure loans from the latter to the former. In May 1974, the said banque carried out a restructuring scheme whereby the original banque was dissolved and its banking business was transferred to Societe De L'Indochine ('Societe'), which immediately changed its name to Banque De L'Indochine ('the new banque'), ie the same name as the existing banque. The new banque had sent a circular to all the customers of the existing banque regarding its restructuring scheme. The new banque was issued a banking licence by the Minister of Finance on 22 May 1974. The change of name from Societe De L'Indochine to Banque De L'Indochine was only registered by the Registrar of Companies on 2 July 1975. In October 1982, the new banque, after a further change of name but possessing a valid banking licence, effected a transfer to the first applicant, Malaysian French Bank Bhd of its assets and liabilities, including its rights under the debenture, and also surrendered its banking licence. At the same time the first applicant was also issued a banking licence. The first respondent agreed to the transfer of all the rights of the new banque under the debenture to the first applicant. Upon the first respondent's failure to repay the loan, the first applicant appointed the second, third and fourth applicants as receivers and managers of the first respondent. The first applicant then applied to the High Court for an order that the second, third and fourth applicants be entitled to sell the first respondent's assets in accordance with the debenture. The first respondent opposed the first applicant's application firstly on the ground that since the banking licence

of the new banque was not published in the gazette as required by s 13 of the Banking Act 1973 ('the 1973 Act') the licence of the new banque was null and void. The first respondent then argued that Societe had failed to apply for a banking licence under s 3(2) of the 1973 Act and that the licence of the new banque was therefore wrongly issued. The first respondent further contended that since Societe's change of name was only registered after the new banque had been issued a banking licence, the issue of the licence contravened s 22(1) and (2) of the Companies Act 1965 ('the 1965 Act'). The first respondent also contended that the issue of the licence violated Gazette Notification No 1484/66 which empowered the Minister of Commerce and Trade to direct the Registrar of Companies not to register any company that had the name 'bank' without the Minister's approval. The first respondent finally argued that between October 1982 and April 1985, the new banque was doing banking business by being the first applicant's proxy but without a banking licence when it held the securities of its customers.

Held, allowing the application:

(1) The publication of the banking licence of the new banque as required by s 13 of the 1973 Act is not a condition precedent to the issue of a licence under s 3 of the 1973 Act. The requirement of publication is only a means to let the public know the names of the banks to which licences have been issued. Furthermore there is no penalty imposed for failure to cause the list to be published. Banks also do not have control over those who are enjoined by s 13 of the 1973 Act to carry out the publication. Any omission or error in the publication will cause injustice only to the bank concerned and not to the general public. Section 13 of the 1973 Act is therefore directory and not mandatory.

(2) On the facts in this case, Societe had complied with s 3(2) of the 1973 Act.

(3) Section 22(1) and (2) of 1965 Act and Gazette Notification No 1484/66 merely empowered the Minister of Commerce and Trade to disallow registration of a company having the name 'bank'. The power to forbid any corporation which does not have a banking licence to use the word 'bank' in its name is conferred on the Minister of Finance pursuant to s 9(1)(a) of the 1973 Act. In issuing the banking licence to the banque, s 9(1)(a) of the 1973 Act did not apply and s 22(1) and (2) of the 1965 Act had not been violated.

(4) The first respondent was estopped from denying that the debenture had been properly transferred to the new banque since the first respondent had entered into an agreement with Societe to transfer the debenture to the new banque. Moreover the first respondent had continued to deal with the new banque to get loans from the latter on the strength of the debenture.

(5) After October 1982, the new banque did not take any security but merely retained the securities of its customers in anticipation of

transferring them to the first applicant which had and still has a valid banking licence. It is not within the province of the first respondent to question the exercise of the Minister's discretion in issuing a banking licence to the first applicant under s 3(1) of the 1973 Act.

[Bahasa Malaysia summary

Penentang pertama, Joo Seng Rubber Co Sdn Bhd telah membentuk, antara lain, debentur atas asetnya untuk faedah Banque De L'Indochine ('bank yang sedia ada') untuk menjamin pinjaman daripada bank itu kepadanya. Dalam bulan Mei 1974, bank tersebut telah menjalankan satu skim pembentukan semula dengan mana bank yang sedia ada itu telah dibubarkan dan perniagaan bank itu telah dipindahmilik kepada Societe De L'Indochine ('Societe'), yang dengan segera menukar namanya kepada Banque De L'Indochine ('bank baru'), iaitu nama yang sama dengan bank yang sedia ada itu. Bank baru itu telah menghantar pekeliling kepada semua pelanggan bank yang sedia ada itu tentang skim pembentukan semulanya. Bank baru itu telah diberi lesen untuk menjalankan perniagaan bank oleh Menteri Kewangan pada 22 Mei 1974. Penukaran nama daripada Societe De L'Indochine kepada Banque De L'Indochine hanya didaftarkan oleh Pendaftar Syarikat pada 2 Julai 1975. Pada Oktober 1982, bank baru itu, selepas penukaran nama selanjutnya tetapi dengan mempunyai lesen perniagaan bank yang sah, telah melaksanakan pemindahan milik kepada pemohon pertama, Malaysian French Bank Bhd, aset dan liabilitinya, termasuk haknya di bawah debentur tersebut dan juga menyerahkan lesen perniagaan banknya. Pada masa yang sama pemohon yang pertama telah juga diberi lesen perniagaan bank. Penentang pertama bersetuju untuk memindahmilik semua hak bank baru itu di bawah debentur tersebut kepada pemohon pertama. Selepas penentang pertama gagal untuk membayar balik hutangnya, pemohon pertama telah melantik pemohon kedua, ketiga dan keempat sebagai penerima dan pengurus penentang pertama. Pemohon pertama kemudiannya memohon kepada Mahkamah Tinggi untuk perintah bahawa pemohon kedua, ketiga dan keempat berhak menjual aset penentang pertama mengikut debentur tersebut. Penentang pertama menentang permohonan pemohon pertama pada pertamanya atas alasan bahawa kerana lesen perniagaan bank bagi bank baru itu tidak disiarkan dalam warta seperti yang dikehendaki oleh s 13 Akta Bank 1973 ('Akta 1973 itu') lesen bank baru itu adalah terbatal dan tak sah. Penentang pertama kemudian berhujah bahawa Societe telah gagal untuk memohon untuk lesen perniagaan bank di bawah s 3(2) Akta 1973 itu dan bahawa lesen bank baru itu oleh kerana itu dikeluarkan dengan salah. Penentang pertama selanjutnya berhujah bahawa kerana penukaran nama Societe hanya telah didaftarkan selepas bank baru itu telah diberikan lesen perniagaan bank, pengeluaran lesen itu melanggar s 22(1) dan (2) Akta Syarikat 1965 ('Akta 1965 itu'). Penentang pertama juga berhujah bahawa pengeluaran lesen itu

melanggar Pemberitahuan Warta No 1484/66 yang memberi kuasa kepada Menteri Perdagangan untuk mengarah Pendaftar Syarikat supaya jangan mendaftar sebarang syarikat yang bernama 'bank' tanpa kelulusan Menteri tersebut. Penentang pertama akhirnya berhujah bahawa di antara Oktober 1982 dan April 1985, bank baru itu telah menjalankan perniagaan bank dengan menjadi proksi pemohon pertama tetapi tanpa lesen perniagaan bank semasa ia memegang cagaran pelanggannya.

Diputuskan, membenarkan permohonan itu:

(1) Penyiaran lesen perniagaan bank bagi bank baru itu seperti yang dikehendaki oleh s 13 Akta 1973 itu bukanlah satu syarat terdahulu untuk pengeluaran lesen di bawah s 3 Akta 1973 itu. Keperluan penyiaran adalah hanya satu jalan untuk memberitahu orang ramai nama bank yang mana lesen telah diberikan. Lagipun tiada penalti dikenakan kerana kegagalan menyebabkan senarai itu disiarkan. Bank juga tidak mempunyai kawalan atas mereka yang diperintahkan di bawah s 13 Akta 1973 itu untuk menjalankan penyiaran itu. Sebarang peninggalan atau kesilapan dalam penyiaran itu akan menyebabkan ketidakadilan hanya kepada bank berkenaan dan bukan kepada orang ramai. Seksyen 13 Akta 1973 itu oleh kerana itu adalah secara arahan dan bukan mandatori.

(2) Pada fakta kes ini, Societe telah mematuhi s 3(2) Akta 1973 itu.

(3) Seksyen 22(1) dan (2) Akta 1965 itu dan Pemberitahuan Warta No 1484/66 hanya memberi kuasa kepada Menteri Perdagangan untuk enggan mengizinkan pendaftaran sesebuah syarikat yang mempunyai nama 'bank'. Kuasa untuk melarang sebarang korporasi yang tidak mempunyai lesen perniagaan bank untuk menggunakan perkataan 'bank' dalam namanya diberikan kepada Menteri Kewangan mengikut s 9(1)(a) Akta 1973 itu. Dalam mengeluarkan lesen perniagaan bank kepada bank itu, s 9(1)(a) Akta 1973 itu tidak terpakai dan s 22(1) dan (2) Akta 1965 itu tidak dilanggar.

(4) Penentang pertama diestop daripada menafikan bahawa debentur itu telah dipindahmilik dengan sempurna kepada bank baru itu memandangkan yang penentang pertama telah mengikat perjanjian dengan Societe untuk memindahmilik debentur itu kepada bank baru itu. Legipun penentang pertama telah meneruskan urusan dengan bank baru itu untuk mendapatkan pinjaman daripadanya dengan bergantung kepada debentur itu.

(5) Selepas Oktober 1982, bank baru itu tidak mengambil sebarang cagaran tetapi hanya menyimpan cagaran pelanggannya semasa menantikan masa untuk memindahmiliknya kepada pemohon pertama yang ada dan masih ada lesen perniagaan bank yang sah. Tidaklah dalam lingkungan penentang pertama untuk menyoal penjalanan budi bicara Menteri dalam mengeluarkan lesen perniagaan bank kepada pemohon pertama di bawah s 3(1) Akta 1973 itu.]

[**Editorial Note**: The first respondent has appealed to the Supreme Court vide Civil Appeal No 02–406–91.]

Cases referred to

1 *State of Punjab v Satya Pal* AIR 1969 SC 903 (folld)
2 *Amalgamated Investment & Property Co (in liq) v Texas Commerce International Bank* [1981] 2 WLR 554; [1981] 1 All ER 923 (folld)
3 *Koh Kim Chai v Asia Commercial Banking Corp Ltd* [1984] 1 MLJ 322 (distd)

Legislation referred to

Banking Act 1973 ss 2, 3(1), (2)(a), (b), (c), (3), (4), 5, 6, 9(1)(a), 13, 24
Companies Act 1965 ss 22(1), (2), 332(1), 334(1), Forms 84, 91
Companies Ordinance 1940 s 301(1)

DP Naban (*Skrine & Co*) for the applicants.
Pathmanathan s/o Mylvaganam (*Yusuf Lee Pathma & Marbeck*) for the first respondent.

Cur Adv Vult

Lim Beng Choon J: In an application made by way of this originating summons filed on 17 October 1989 the first applicant, namely, the Malaysian French Bank Bhd is asking for, inter alia, the following orders, which I quote:

(a) that the receivers and the managers [who are named as second, third and fourth applicants] of Joo Seng Rubber Co Sdn Bhd [who is named as the first respondent] be at liberty to sell the abovesaid lands and/or parts thereof and securities registered in the name of Joo Seng Rubber Co Sdn Bhd in accordance with the terms of the debenture dated 11 March 1971;
(b) that the first applicant, Malaysian French Bank Bhd, and/or the receivers and managers of Joo Seng Co Sdn Bhd be entitled to execute on behalf of the said Joo Seng Rubber Co Sdn Bhd any transfers in respect of the said lands which the receivers and managers may present;
(c) that any such transfers presented to the registrar shall have stated therein the names of the transferees and the consideration;
(d) that any transfers of the said lands duly executed in the manner described in para (b) above be registered by the Registrar of Titles in favour of the transferees named therein.

The grounds relied on by the applicants as can be seen from the affidavit dated 17 October 1989 in support of their application can be summarized as follows.

By a debenture made on 11 March 1971 ('the debenture') between the first respondent and Banque De L'Indochine, the first respondent charged its undertaking, property and assets both present and future by way of security in favour of Banque De L'Indochine to secure payment to the Banque De L'Indochine of the money obligations and liabilities mentioned

in the debenture. The debenture was duly registered pursuant to the provisions of the Companies Act 1965. The provisions of the debenture which are material to the present case are, inter alia, as follows:

(a) the principal moneys thereby secured shall become immediately repayable on demand being made by Banque De L'Indochine;

(b) Banque De L'Indochine may, at any time after the principal moneys thereby secured shall have become payable, appoint any person or persons to be receivers and managers of the property and assets thereby charged;

(c) such receivers and managers appointed as aforesaid shall be the agents of the company [namely, the first respondent] and shall have power, inter alia:

(i) to take possession of and get in the property and assets of the company thereby and/or;

(ii) to sell or concur in selling any of the properties and assets thereby charged. And in exercising the power of sale thereby conferred, the receivers and managers may sell at such time and in such manner and at such price as they think fit, and in exercising such discretion they may have regard to the views and desires of Banque De L'Indochine and shall not be accountable for any loss or damage which may be alleged to have been suffered by the company by reason of their discretion;

(iii) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers therein and which they may lawfully do as agent of the company and/or;

(iv) to do any other act or thing which a receiver and manager appointed by the court is permitted to do.

(d) The net proceeds of any sale shall be applied by the receivers and managers: firstly, in payment of all costs, charges and expenses of and incidental to the appointment of the receivers and managers or the exercise by them of all or any powers therein including reasonable remuneration of the said receivers and managers; secondly, in or towards payment of all interest; thirdly, in or towards payment of all principal moneys secured thereby and fourthly, any surplus shall be paid to the company.

In addition to the said debenture, the first respondent had on 11 March 1971, charged its land held under Certificate of Title No 14733 for Lot 1558N in the town of Ipoh, Kinta in favour of Banque De L'Indochine and the said charge was duly registered under the National Land Code 1965 on 27 April 1971. Again on 8 October 1973, the first respondent charged two more lots of its lands in Penang in favour of Banque De L'Indochine to secure repayment of all sums of moneys advanced or to be advanced by Banque De L'Indochine to the first respondent. The charge was duly registered under the National Land Code 1965 on 5 November 1973. On 22 December 1980, the first respondent further charged seven parcels of its lands in Mukim Batang Padang Perak in favour of Banque De L'Indochine Et De Suez to further secure the repayment of all sums of moneys advanced or to be advanced by Banque De L'Indochine Et De Suez to the first respondent. Again the charge was registered under the National Land Code 1965 on 7 March 1981.

Amongst the assets and properties of the first respondent charged to Banque De L'Indochine under the debenture are, inter alia, shares regis-

tered in the name of the first respondent in various companies the particulars of which are set out in exh 'RA-5' annexed to the affidavit of the second applicant affirmed on 17 October 1989. The first respondent is also a full member of the Kuala Lumpur Commodity Exchange, the membership of which is transferable. A copy of the certificate of membership has been annexed as exh 'RA-8' to the aforesaid affidavit of the second applicant.

By a transfer of debenture dated 1 April 1985 made between Banque De L'Indochine (apparently the deponent of the affidavit encl 2 made a mistake as the transferor banque was Banque De L'Indochine Et De Suez) as transferor of the one part and the first applicant as transferee of the other part, Banque De L'Indochine (again it should be Banque De L'Indochine Et De Suez) transferred to the first applicant the debenture and all the principal moneys and interest secured thereby and the full benefit thereof (see exh 'RA-9' annexed to the aforesaid affidavit). All the parcels of land originally charged to Banque De L'Indochine by the first respondent were also all transferred to the first applicant by two transfers of charges which were duly registered on 7 December 1987 and 6 January 1988 respectively (see exhs 'RA-10A', 'RA-10B' and 'RA-11' annexed to the aforesaid affidavit). Apparently the first respondent failed to make any repayment of the loans granted by the first applicant and the first applicant in exercise of the rights conferred on it under the debenture now applies to this court for the orders set out in paragraph one of this judgment.

In opposing the application of the applicants, the first respondent relied on several grounds in support of its opposition. It is premature for me to set out the grounds relied on by the first respondent at this stage simply because in order to be able to comprehend the said grounds it is necessary at least to state the undisputed facts of the case. Suffice it to state here that the several grounds of the first respondent are directed to contend that the purported transfer of the debenture to the first applicant on 1 April 1985 was illegal and void in law.

The facts that cannot be disputed are as follows. Banque De L'Indochine which was incorporated in France set up a branch in Kuala Lumpur also called Banque De L'Indochine which was duly registered under s 301(1) of the Companies Ordinance 1940 as a foreign company with a registered office at 44 Pudu Road (Ground Floor), Kuala Lumpur and operating its banking business under a banking licence issued to it on 15 April 1965. When the Companies Act 1965 came into force, Banque De L'Indochine was again issued with a certificate of registration of foreign company pursuant to s 334(1) of the Companies Act 1965 (hereinafter referred to as 'the 1965 Act' unless otherwise specified) on 23 October 1973 (see exh 'LKH-7' of the affidavit of Loh Kok Hu, a director of the first respondent affirmed on 16 August 1990 in encl 9). As stated earlier, by a debenture made on 11 March 1971 between the first respondent and this Banque De L'Indochine, the first respondent charged its undertakings, property and assets both present and future by way of security in favour of the said banque to secure payment to the said banque of the money, obligations, and liabilities mentioned in the debenture. The debenture was duly registered under the

1965 Act (see exh 'LPS-2' which was a copy of Form 40 Certificate of Registration of Charge dated 15 March 1971 signed by the assistant registrar of companies annexed to the affidavit of Lee Peng Seng, the manager (marketing) of the first applicant in encl 10). Subsequently under a reconstruction scheme adopted by the said banque head office in France, the banking business hitherto carried on by the said banque in Kuala Lumpur as well as the said head office and all its branches throughout the world was dissolved on 31 May 1974. The agent of the Banque De L'Indochine Kuala Lumpur (hereinafter referred to as 'the original Banque De L'Indochine') duly gave notice in Form 91 of the 1965 Act of the dissolution to the Registrar of Companies ('the ROC') (see exh 'LKH-1' of the affidavit-in-reply of Loh Koh Hu affirmed on 27 February 1990 in encl 5). On the same date as the dissolution of the original Banque De L'Indochine, the banking business of the said banque was transferred to Societe De L'Indochine ('the Societe') a company incorporated in France with limited liability which had an office at the same address as the original Banque De L'Indochine that is at 44 Jalan Pudu, Kuala Lumpur. In anticipation of the Societe taking over the banking business of the original Banque De L'Indochine and operating it under the same name ie Banque De L'Indochine (hereinafter referred to as 'the new Banque De L'Indochine') the said original banque wrote a letter to the Ministry of Trade and Industry on 30 May 1974. For the purpose of the judgment I need only to reproduce the following relevant paragraphs of the said letter:

> The said Banque De L'Indochine presently has a subsidiary incorporated in France known as Societe De L'Indochine which is not registered in Malaysia as a foreign company. A reconstruction of the existing Banque De L'Indochine is due to be effected on 31 May 1974 the effect of which will be that the banking business of the existing Banque De L'Indochine in all countries will be transferred to the abovementioned subsidiary Societe De L'Indochine. Also on 31 May 1974 Banque De L'Indochine after it has transferred its banking business to Societe De L'Indochine will be automatically dissolved under French law and notice of such dissolution will be given to the Registrar of Companies, Malaysia who will be asked to remove the name of the existing Banque De L'Indochine from the register of foreign companies pursuant to s 340(5) of the Malaysian Companies Act 1965.
>
> Also on 31 May 1974, Societe De L'Indochine will change its name to 'Banque De L'Indochine' ie the same name as the existing banking company and it is desired that the new company under the name of 'Banque De L'Indochine' be registered with the Registrar of Companies, Malaysia as a foreign company. As the name of the new company includes the word 'Bank' under the French equivalent (Banque) it is necessary to obtain your Ministry's approval to the registration of the name of the new company under the provisions of the Gazette Notification No 1484/66 and the purpose of this letter is to seek your approval to such name.
>
> Bank Negara Malaysia has approved of the above reconstruction and has in fact already issued a licence in the name of the new Bank ie 'Banque De L'Indochine' authorizing it to carry on banking business under the Banking Act 1973 with effect from 1 June 1974 and in discussion confirmed its approval to the use of the word 'Banque' in the name of the new company. In discussions

with the Registrar of Companies he also confirmed that subject to obtaining the necessary approvals from your Ministry he would accept the name of 'Banque De L'Indochine' for the registration of the new company in Malaysia as a foreign company.

As it is necessary for the new company to be registered within one month after it commences business in Malaysia on 1 June 1974 we would appreciate your earliest approval to the name of the new company to enable our client to comply with s 332 of the Companies Act 1965.

Yours faithfully

cc Bank Negara Malaysia,
Kuala Lumpur (Attention Mr Chee ? Yong)

Registrar of Companies, Malaysia
Bangunan Bank Negara
Kuala Lumpur (Attention: The Registrar)

(See exh 'LPS-8' annexed to encl 10 in the affidavit of Lee Peng Seng.)

About a week prior to the writer of the aforesaid letter sending it to the Ministry of Trade and Industry, the Minister of Finance had issued a banking licence which reads as follows:

Malaysia
Banking Act 1973
Licence to carry on banking business

In pursuance to s 3 of the Banking Act 1973, I, Abdul Razak bin Datuk Hussein, Minister of Finance, do hereby grant to Banque De L'Indochine a licence to transact banking business in the Federation with effect from 1 June 1974.

Dated this 22 May 1974.
[PERB 0.5005 Vol 2]

Signature
(Abdul Razak bin Datuk Hussein)
Minister of Finance,
Malaysia

(See exh 'LPS-6' annexed to encl 10 in the affidavit of Lee Peng Seng.)

In forwarding the aforesaid banking licence to the said banque, Bank Negara wrote the following letter to the said banque:

28 Mei 1974

Pengurus,
Banque De L'Indochine,
44 Jalan Pudu,
Kuala Lumpur.

Tuan,

Banking Licence — Banque De L'Indochine

We forward herewith the licence issued to the Banque De L'Indochine to conduct banking business in Malaysia with effect from 1 June 1974. Kindly

return the licence issued to the former Banque De L'Indochine to Bank Negara Malaysia for cancellation.

Dengan hormatnya,
(Mohd Taib bin Abdul Hamid)
Penasihat,
Perkhidmatan Bank

(See exh 'LPS-7' annexed to encl 10 in the affidavit of Lee Peng Seng.)

In the meantime the first respondent executed an agreement on 22 May 1974 (hereinafter referred to as 'the 1974 agreement') with the Societe. As this agreement plays an important part in the present contest between the parties and is quite short it is useful to set out in full the contents of the agreement which are as follows:

This agreement is made 22 May 1974 between Joo Seng Rubber Co Sdn Bhd (hereinafter called 'the customer') of the one part and Societe De L'Indochine incorporated in France with limited liability and having an office in Malaysia at 44 Jalan Pudu, Kuala Lumpur (hereinafter referred to as 'Societe') of the other part.

Whereas the customer has for some time past up to the date hereof utilized overdraft and other banking facilities granted to him by Banque De L'Indochine (hereinafter referred to as 'Banque') and as security for such facilities the customer created in favour of Banque the security specified in the schedule hereto (hereinafter referred to as 'the existing security').

And whereas the customer has been advised by Banque that under a reconstruction of Banque the banking business hitherto carried on by Banque in Malaysia and elsewhere is on 31 May 1974 to be transferred to Societe.

And whereas on 31 May 1974 Banque will be dissolved and Societe will change its name to 'Banque De L'Indochine'.

And whereas the customer has agreed to transfer his accounts presently operated with Banque at its Kuala Lumpur Branch to Societe with effect from the start of business on 1 June 1974 and the customer is desirous of Societe granting to him similar overdraft and other banking facilities as presently enjoys from Banque.

Whereby it is hereby agreed between the parties hereto as follows:

1 The customer hereby applies to Societe and Societe hereby agrees to grant to the customer overdraft and other banking facilities of a similar nature and up to the same limit as those previously granted to and enjoyed by the customer from Banque at the date hereof on Societe's terms for making such advances and such facilities shall be made available to the customer by Societe after 31 May 1974 when the Kuala Lumpur branch of Banque becomes a branch of Societe having then changed its name to Banque De L'Indochine subject always to the rights of Banque to call up the moneys advanced by Banque to the customer before the said 31 May 1974 and to the customer complying with all terms and conditions of the existing security.

2 In consideration of Societe granting to the customer the facilities referred to in cl 1 hereof the customer hereby:

(a) agrees to Societe taking a transfer from Banque of the existing security;
(b) agrees and confirms that the existing security when transferred to Societe shall be security to Societe for all moneys owing by me on my account or accounts with Banque as at the close of business on 31 May 1974 and

which will be transferred to my new account or accounts with Societe and any further advances which are extended by Societe either in its present name or its new name of Banque De L'Indochine to the customer.

3 The customer undertakes to execute in favour of Societe similar security documents as presently held by Banque when requested to do so by Societe.

4 In this agreement where the context so permits:

(a) words importing the masculine gender include the feminine or neuter genders;
(b) words applicable to natural persons include any body of persons company corporation firm or partnership corporate or unincorporate;
(c) words in the singular include the plural and vice versa.

5 This agreement shall be binding upon the personal representatives successors in title and assigns of the customer and Societe.

The schedule before referred to

Nature of document	Date	Particulars of property secured	Amount secured
Debenture	11 March 1971	See cl 2 of debenture	$8m
Charge	11 March 1971	See schedule to Charge Presentation No 1980/71	
Charge	11 March 1971	See schedule to Charge Presentation No 315/71	

In witness whereof the parties hereto have hereunto set their hands or affixed their common seals the day and year first before written.

Signed by the customer in the presence of:) Joo Seng Rubber Co Sdn Bhd
Managing Director

or

The common seal of the customer was hereunto affixed in the presence of:)

Signed by the attorney of Societe De L'Indochine in the presence of:) Signature

Signature
Advocate and Solicitor,
Kuala Lumpur

We, Banque De L'Indochine hereby consent to the transfer of the existing security to Societe upon the terms and conditions specified in the within written agreement.

Banque De L'Indochine
Signature

In addition the original Banque De L'Indochine also executed a transfer of debenture with the Societe on 31 May 1974 duly stamped on 15 June 1974 whereby 'in consideration of the new Banque De L'Indochine taking over

all their rights and liabilities specified in the debenture specified in the schedule thereto stamped to secure to a limit of $6m and issued by Joo Seng Rubber Co Sdn Bhd', the original Banque De L'Indochine thereby transferred to the Societe the debenture and all principal moneys and interests secured thereby and the full benefit thereof subject to the conditions on which the Societe held the same. It was likewise stated in the said transfer that the Societe agreed to take the same subject to all conditions affecting or appertaining to the same (see exh 'A-9' annexed to encl 6 in the affidavit of Lee Peng Seng). To further ensure that all the customers of the original Banque De L'Indochine knew about the restructuring of the banking business and the transferring of the said banking business to the Societe which would be operating the said business under the same name as the said original banque, the new Banque De L'Indochine sent a circular letter dated 25 May 1974 to all the customers of the said original banque informing them of the restructuring and the transferring of the banking business to the new Banque De L'Indochine and the dissolving of the original Banque De L'Indochine. By that letter every customer was told, inter alia, that if the said new banque had no instruction to the contrary by 30 May 1974 it would be assumed that the customer agreed to the transfer and continued to continue operating his or her account(s) with the said new banque. There are three passages in that letter that are, as can be seen later, important and it is useful to reproduce them:

> The effect of the reconstruction will be that the banking business of the existing bank in all countries where banking business is carried on will be transferred to a company known as Societe De L'Indochine (hereinafter referred to as 'the new bank'). The new bank is incorporated in France and will have the same head office, the same directors and the same form of constitution as the existing bank.
>
> On the same day as the new bank takes over the banking business of the existing bank the existing bank will be automatically dissolved under French law. Immediately after the dissolution of the existing bank the new bank will change its name to 'Banque De L'Indochine' ie the same name as the existing bank.
>
> The general character and policy of business will remain unchanged and in order to ensure continuity the staff of the existing bank will continue to look after your business and ensure that you receive the personal attention and understanding of your requirements to which you have been accustomed in the past.

There is no doubt that although the ROC did not issue the certificate of registration of foreign company to the Societe until 1 July 1975 nonetheless in the said certificate (see exh 'LKH-2' annexed to encl 8 in the affidavit-in-reply of Loke Kok Hu, director of the first respondent) it was stated that:

> This is to certify that a company called Societe De L'Indochine which was formed or incorporated in France did on 29 June 1974 duly comply with the provisions of s 332(1) of the Companies Act 1965.

Following the issue of the aforementioned certificate, the ROC issued another certificate of change of name of the Societe which would henceforth be called 'Banque De L'Indochine'. The said certificate was issued on 2 July 1975 (see exh 'A-6' annexed to encl 6 in the affidavit of Lee Peng Seng).

On 15 November 1975, an agent of the new Banque De L'Indochine in Malaysia completed Form 84 which was the form to give particulars of change or alteration relating to foreign company and sent it to the ROC to apply for a change of name of the new Banque De L'Indochine effective from 30 September 1975. Particulars of the change or alteration were as follows:

> Re statute of the company;
>
> the name of the company was changed from Banque De L'Indochine to Banque De L'Indochine Et De Suez.

Together with the said Form 84, the said agent also lodged the necessary documents giving full details and particulars of the change and the minutes of the extraordinary general meeting of the company (ie Banque De L'Indochine Et De Suez held on 30 September 1975) (see exh 'A-10A' of encl 6 in the affidavit of Lee Peng Seng). On receipt of the said Form 84 the ROC duly issued a certificate of change of name certifying that Banque De L'Indochine having changed its name was then to be known as Banque De L'Indochine Et De Suez. The said certificate was dated 4 December 1975 (see exh 'A-10B' of encl 6 in the affidavit of Lee Peng Seng). Banque De L'Indochine Et De Suez was also issued with a licence to carry on banking business (see exh 'LKH-11' of encl 9 in the affidavit of Loh Kok Hu). The first respondent charged seven lots of its lands in Mukim Batang Padang to the Banque De L'Indochine Et De Suez as security for loans which had been and would be granted to it from time to time. The annexure to the charge instrument dated 22 December 1980 made reference to the debenture as the principal instrument under which the charge was made. The charge was registered with the Pemungut Hasil Tanah Negeri Perak on 7 March 1980 (see exh 'A-11' of encl 6 in the affidavit of Lee Peng Seng). Furthermore the said charge was also registered with the ROC on 30 January 1981 — see exh 'LSP-9' of encl 10 in the affidavit of Lee Peng Seng.

On 10 December 1982, an agreement (hereinafter referred to as 'the 1982 agreement') was executed between Banque De L'Indochine Et De Suez and the present first applicant whereby it was stated in the recitals that the Malaysian French Bank Bhd, as transferee, was incorporated in Malaysia on 3 August 1982 for the purpose of acquiring the undertaking including the assets and liabilities and goodwill of the Banque De L'Indochine Et De Suez, as the transferor and that the acquisition of the undertaking by the transferee from the transferor and the terms of such acquisition were approved by Bank Negara Malaysia, the foreign investment committees and the capital issues committee. In the recitals it was also stated that the transfer of the undertaking was deemed to have been effected with effect from 1 October 1982 notwithstanding that the assets and liabilities had not yet been formally transferred. The assets acquired by the transferee as stated in the terms of the agreement included, inter alia, the immovable properties of the transferor, particulars of which were specified in the First Schedule thereof and the securities held by the transferor as at the effective date (ie 1 October 1982) from customers of the transferor in respect of

facilities granted by the transferor to such customers in the normal course of the transferor's business as a licenced bank (see exh 'LSP-1' of encl 10 in the affidavit of Lee Peng Seng). The first applicant was also issued with a licence to carry out banking business by the Minister of Finance on 1 October 1982 (see exh 'LSP-10' of encl 10 in the affidavit of Lee Peng Seng). The first respondent was not only aware of the transfer of the assets and liabilities of Banque De L'Indochine Et De Suez to the first applicant but it also agreed to transfer, inter alia, the debenture to the first applicant as security for advances made to it by the first applicant. The first respondent further agreed that the several charges of its lands and the lien on shares would also be transferred to the first applicant (see exh 'A-13' of encl 6 in the affidavit of Lee Peng Seng).

Finally in view of the grounds raised by the first respondent in opposing the present application of the applicants, the first applicant through its Pengurus Besar Urusan Bank wrote to Bank Negara on 11 September 1990 to enquire about the banking licences issued to Bank De L'Indochine, Bank De L'Indochine Et De Suez and the Malaysian French Bank. In response the Pengurus Jabatan Pengawalan Bank of Bank Negara wrote to the first applicant the following letter dated 28 September 1990:

> Banking Licences
>
> We refer to your letter of 11 September 1990 on the above. Further to our letter 11 August 1990 we would confirm that the banking licence issued by the Minister of Finance in the name of Banque De L'Indochine on 15 April 1965 pursuant to s 3 of the Banking Ordinance 1958 was surrendered upon a new licence being issued under the same name (Banque De L'Indochine) with effect from 1 June 1974. We wish to clarify that the issue of the new licence under the name of Banque De L'Indochine in 1 June 1974 was because the banking business of the 'old' Banque De L'Indochine was transferred to Societe De L'Indochine on 31 May 1974 which on the same day changed its name to Banque De L'Indochine, thereby necessitating the issue of the new licence to Banque De L'Indochine on 1 June 1974. This licence was valid until it was surrendered on 30 September 1975 ie when the bank changed its name to Banque De L'Indochine Et De Suez. From our record, we found that no licence has been issued in the name of Societe De L'Indochine.
>
> We would therefore reiterate that Banque De L'Indochine (old as well as new as explained above), Banque De L'Indochine Et De Suez and Malaysian French Bank Bhd had and has at all times to the present day valid banking licences under the provision.
>
> Yang benar,
> Signature
> (Abdul Murad Khalid)
> Pengurus,
> Jabatan Pengawalan Bank.
>
> (See exh 'LPS-1' of encl 12 in the affidavit of Lee Peng Seng.)

In opposing the application of the applicants for the orders mentioned in para 1 of this judgment the first respondent in its affidavits and also through its counsel contended that firstly, the transfer of the debenture dated 31

May 1974 from the original Banque De L'Indochine to the Societe was null and void for the following reasons: A

(i) On 31 May 1974, the Societe was not in possession of a valid licence but the 'replacement' licence issued to the original Banque De L'Indochine and
(ii) Any licence issued by the Minister through Bank Negara pursuant to s 24 of the Banking Act 1973 (Act 102) is an invalid licence. B

I can say quite categorically that I totally disagree with the contention of the first respondent for the following reasons.

It may be recalled that the head office of the original Banque De L'Indochine was carrying out a restructuring scheme whereby all its banking branches throughout the world were to be dissolved as from 31 May 1974 and new branches were to be set up which would be taken over by the Societe. In anticipation of this reconstruction scheme an application must have been made to Bank Negara for a banking licence to be issued to the new Banque De L'Indochine Kuala Lumpur pursuant to s 3(2) of the Banking Act 1973. Bearing in mind that a banking licence was issued by the Minister of Finance to a corporation known as Banque De L'Indochine on 22 May 1974 which licence was to come into effect on 1 June 1974, it is highly ridiculous for the first respondent to suggest that the Societe did not apply for a banking licence under the said s 3(2) and that it was carrying on banking business under the 'replacement' licence issued to the old Banque De L'Indochine. There is no reason whatsoever for Bank Negara to recommend to the Minister of Finance who likewise had no reason whatsoever to issue a 'replacement' banking licence to the old Banque De L'Indochine when they were fully aware of the fact that the said old banque was to be dissolved on 31 May 1974. It is too ludicrous even to think that Bank Negara and the Minister of Finance would have issued a replacement banking licence to the old Banque De L'Indochine which body would cease to exist as from 31 May 1974. The one and only logical conclusion that one can arrive at is that the banking licence issued on 22 May 1974 was issued to the new Banque De L'Indochine which was to be owned and managed by the Societe. This is made clear by the letter written by Bank Negara dated 28 May 1974 in which it requested the old Banque De L'Indochine to return its licence issued in 1965 for cancellation and another letter written by Bank Negara on 28 September 1990 which said, inter alia, that and I quote:

> We wish to clarify that the issue of the new licence under the name of Banque De L'Indochine on 1 June 1974 was because the banking business of the 'old' Banque De L'Indochine was transferred to Societe De L'Indochine on 31 May 1974 which on the same day changed its name to Banque De L'Indochine thereby necessitating the issue of the new licence to Banque De L'Indochine on 1 June 1974.

It was then suggested by the first respondent that although in both Gazette Notifications PU(B)112 of 7 March 1974 and PU(B)110 of 31 March 1975 publishing the names of banks that were licenced under the Banking Act 1973, the name of Banque De L'Indochine appeared therein, it was

however stated that the date on which the bank was licenced was 15 April 1965. This, so said the first respondent, showed firstly, that the banking licence issued by the Minister of Finance on 22 May 1974 was in fact a 'replacement' licence issued to the old Banque De L'Indochine. In other words it was an extension of its 1965 licence. To my mind it proves nothing of that sort because the issue of a replacement or extension of the 1965 licence would be an exercise in futility for the reasons as stated earlier. It is my considered opinion that there was a mistake in not publishing the date of the issue of the licence to the new Banque De L'Indochine and it must have occurred in this way. Bearing in mind that in spite of the request made to the old Banque De L'Indochine to return its old licence for cancellation, it failed to do so. The 1965 licence issued to it was still on record. Now the 1974 licence was issued to a bank that carried the same name. It was therefore understandable that the officer of Bank Negara who caused the publications to be made mistakenly cited the 1965 licence instead of the 1974 licence. It was then contended by the first respondent that in any case since the 1974 licence of the new Banque De L'Indochine was not published at all that licence must be held to be null and void for it was mandatory that, pursuant to s 13 of the Banking Act 1973, the Central Bank must cause to be published in the gazette in each year a list of all banks to which licences had been issued. I cannot agree with such a contention. The publication of the list as provided in the said s 13 is not, and I repeat not, a condition precedent to the issue of a banking licence under s 3 of the Banking Act 1973 — it is only a means to let the public know the names of the banks to whom licences have been issued. Furthermore there is no penalty imposed by s 13 to penalize any one who failed to cause the list to be published. In support of my proposition I would refer to Bindra's *Interpretation of Statutes* (7th Ed) p 654 where it is stated:

> On the other hand, where the conditions are imposed merely for administrative purposes and no specific penalty is imposed for breach or violation of such conditions, agreements in breach of them are valid. It is clear law that an act forbidden in public interests, cannot be made lawful for paying penalty in violation, whereas an act which is lawful in itself cannot become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has not been fulfilled.

It is also to be noted that banks have no control over those who are enjoined by the said s 13 to carry out the publication provided therein. Any omission or error in the publication will cause injustice not to the general public but only to the bank concerned. I am therefore of the view that the said s 13 is directory and not mandatory. If an authority is necessary I would refer to *State of Punjab v Satya Pal*[1] at p 916 where it is stated:

> In those cases where strict compliance is indicated to be a condition precedent to the validity of the act itself the neglect to perform it as indicated is fatal. But in cases where although a public duty is imposed and the manner of performance is also indicated in imperative language, the provision is usually regarded as merely directory when general injustice or inconvenience results to others and they have no control over those exercising the duty.

In further support of its contention, the first respondent raised a number of allegations which may be summarized thus: In the first place the first respondent alleged that prior to 22 May 1974 only the Societe was legally in existence. The new Banque De L'Indochine only came into existence after 31 May 1974. Therefore, so said the first respondent, the Banque De L'Indochine named in the 1974 licence was meant for the original Banque De L'Indochine for if it were otherwise the name of the Societe would have appeared in the 1974 licence. In support of the first respondent's allegation counsel for the first respondent drew my attention to the fact that in sending the 1974 licence to Banque De L'Indochine, Bank Negara addressed it to the Pengurus, Banque De L'Indochine, 44 Jalan Pudu, Kuala Lumpur and not to the Societe. This, said counsel, only showed that the 1974 licence was in fact a replacement licence issued to the old Banque De L'Indochine and not to the Societe. In further support of the first respondent's allegation, counsel drew my attention to the letter dated 28 September 1990 (see exh 'LPS-1' annexed to the further affidavit-in-reply of Lee Peng Seng, encl 14) written by the Pengurus Jabatan Pengawalan Bank of Bank Negara in which it was stated, inter alia, that and I quote: 'From the record, we found no licence had been issued in the name of Societe De L'Indochine.'

Counsel also drew my attention to another letter dated 18 August 1990 written by another officer of Bank Negara which stated, inter alia, that and I quote:

> The banking licence issued by the Minister of Finance in the name of Banque De L'Indochine on 15 April 1965 pursuant to s 3 of the Banking Ordinance 1958 was valid until it was surrendered on September 1976 (ie when the bank changed its name to Banque De L'Indochine Et De Suez (or Bank Indosuez);

Pausing here for a moment to consider the aforesaid allegations of the first respondent, I can say at once that all the said allegations (save one of the allegations with which I will deal presently), are so frivolous and trivial that they can all be answered in three sentences. Bearing in mind that the old Banque De L'Indochine had informed Bank Negara that the said banque would be dissolved on 31 May 1974, that its banking business would be taken over by the Societe and that the Societe would change its name to the new Banque De L'Indochine and operate the banking business under this name, it is (at the risk of repeating myself) absurd to suggest that the banking licence issued by the Minister of Finance on 22 May 1974 was meant to be a replacement or an extension of the 1965 banking licence of the original Banque De L'Indochine which would cease to exist as at 31 May 1974 and not for the Societe which would change its name to Banque De L'Indochine and would operate the banking business under that name as at 1 June 1974. In the circumstances it cannot be denied that the 1974 banking licence was sent to the pengurus of the new Banque De L'Indochine at No 44 Jalan Pudu, Kuala Lumpur which was the address of the said new banque although it was also at that same address that the original banque was operating its business before its dissolution. As the Societe had informed Bank Negara that it would be changing its name to the new Banque De L'Indochine and operate its banking business under that name, Bank Negara quite rightly said that 'no licence had been issued in the name of

A Societe De L'Indochine' because the Societe would cease to exist after 31 May 1974 and it would operate its banking business under the new name of Banque De L'Indochine. All the allegations of the first respondent and the contentions of its counsel are best said and rejected. The only allegation that is worthy of some consideration arose from the passage of the letter dated 18 August 1990 written by Bank Negara which I have reproduced
B earlier. Although I say that the allegation is worthy of some consideration, it can easily be resolved by a short explanation. Upon issue of the 1974 banking licence to the new Banque De L'Indochine the original Banque De L'Indochine was asked to return its 1965 licence for cancellation. But it never did and it was only on 30 September 1976 that the 1965 licence was
C surrendered to Bank Negara. Based on the surrender of the 1965 licence on 30 September 1976 and what the writer of the letter of 18 August 1990 had said in that letter the first respondent and its counsel thereupon urged me to hold that it was the original Banque De L'Indochine that changed its name to Banque De L'Indochine Et De Suez ('Banque Indosuez') upon the surrendering of its 1965 licence. Such a proposition of the first respondent
D and its counsel is totally unacceptable simply because, again at the risk of repeating myself, the original Banque De L'Indochine had ceased to exist since 31 May 1974 when it was dissolved. However, as the 1965 licence was not surrendered to Bank Negara until 30 September 1976, that licence as far as Bank Negara was concerned would remain in its record as it had not
E yet been cancelled. It is for this reason that the writer of Bank Negara by letter of 18 August 1990 said that the 1965 licence 'was valid until it was surrendered on 30 September 1976 (ie when the bank changed its name etc)'. When the writer of the Bank Negara letter said that the bank changed its name, he was referring to the new Banque De L'Indochine and not the original Banque De L'Indochine which no longer existed. That being the
F case the only conclusion that one can logically arrive at is that the new Banque De L'Indochine changed its name to Bank Indosuez on 30 September 1974 and I do so hold.

Secondly, the first respondent and its counsel contended that the Societe had failed to make an application to Bank Negara pursuant to sub-s (2) of
G s 3 of the Banking Act 1973 for a banking licence which subsection reads as follows:

> (2) A corporation which desires authority to carry on banking business in the Federation shall apply in writing through the Central Bank to the Minister for a licence under this section and shall supply —
>
> H (a) a copy of the memorandum of association and article of association or other instrument under which the corporation is incorporated, duly verified by a statutory declaration made by a senior officer of the corporation;
> (b) a copy of the latest audited balance sheet of the corporation; and
> (c) such other information as may be called upon by the Minister.

I Therefore, so said counsel, the Minister of Finance was wrong in law to issue the 1974 licence to the new Banque De L'Indochine. It is to be noted that counsel also drew my attention to the letter dated 30 May 1974 written by the original Banque De L'Indochine through its solicitors to the Minis-

ter of Trade and Industry (see exh 'LPS-8' of Lee Peng Seng's affidavit, encl 10) which I have reproduced earlier, and he asserted as that was the only letter written by the said original banque which was carbon copied to Bank Negara therefore it must follow that the Societe had not made an application pursuant to the said sub-s (2) of s 3. I cannot agree with the inference drawn by the counsel. To my mind it is highly improbable that Bank Negara would recommend to the Minister of Finance to issue a banking licence to the new Banque De L'Indochine when the Societe had not made a proper application. In support of my proposition I notice in the first place that Bank Negara had by a letter dated 28 September 1970 (see exh 'LPS-1' of encl 12 in the affidavit of Lee Peng Seng) categorically confirmed, inter alia, that the new Banque De L'Indochine as well as Banque Indosuez and the Malaysian French Bank *had and has at all times* valid licences apparently under the provision of s 3 of the Banking Act 1973. Would Bank Negara make such an unqualified statement had there been a failure on the part of any of the banks in question to properly apply for a banking licence? Needless to say the answer must be an unqualified no. In the second place as one may recall the Societe took over the banking business of the original Banque De L'Indochine under a reconstruction scheme for which approval of the Minister of Finance must be obtained pursuant to s 24 of the Banking Act 1973. The said Minister would only give his approval upon the recommendation of Bank Negara. To get the approval the Societe would certainly have to furnish Bank Negara with all necessary documents which must include the instrument under which it was incorporated, latest audit account and balance sheet and such other information as the Minister might require. That being the case the Societe had complied with the provisions of sub-s (2) of s 3 of the Banking Act 1973 not once but twice. In the third place I notice that in the certificate of registration of foreign company issue by the ROC to the Societe, it was stated that the Societe had duly complied with the provisions of s 332(1) of the Companies Act 1965. Now under s 332(1) of the Companies Act 1965 the Societe had not only to submit a certified copy of the certificate of its incorporation but many more documents as well as a statutory declaration. Bearing in mind that the Societe applied for registration in June 1974 and was able to furnish the ROC with all the necessary documents as stipulated in the said s 332(1), it is highly incredible that in obtaining a banking licence, which was more important, it could have failed to comply with s 3(2) of the Banking Act 1973 where it had only to furnish Bank Negara with just two documents, namely, a copy of the instrument under which it was incorporated and a copy of the latest audited balance sheet. It was not required to submit any other document or information until the Minister requested for such other documents or information. At any rate under the circumstances of the case, it warrants the application of the presumptions of *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done until the contrary is proved) and also of *ex diuturnitate temporis omnia praesumunter esse rite et solennitur acta* (from lapse of time all things are presumed to have been done rightly and regularly). It is therefore my finding that the Societe had fully complied

A B C D E F G H I

with s 3(2) and s 24 of the Banking Act 1973 and the banking licence issued to it under its new name of Banque De L'Indochine was fully valid.

A third line of attack mounted by counsel for the first respondent was:

(a) that the memorandum and articles of association of the Societe did not permit the Societe to do banking business;

(b) that the Societe's memorandum and articles of association was only changed at its extraordinary general meeting ('EGM') held in Paris on 27 May 1974 and even then the change was subject to the approval of the members of the original Banque De L'Indochine to be held on 31 May 1974.

For the above reasons, it was contended that the Societe could not have complied with s 3(2), (3) and (4) of the Banking Act 1973.

Again I cannot agree. The articles of association of the Societe produced by the respondent and annexed to the further affidavit of Loh Kok Hu in encl 9 shows clearly that the object of the Societe was and I quote:

(i) the direct or indirect participation by any appropriate means in *all types of undertakings*: agriculture, commercial, industrial, *financial* or real estate;
(ii) ...
(iii) in general, any management, *lending* or investment operation;
(iv) and more generally speaking, any *operation whatsoever directly or indirectly relating to this object and likely to facilitate their development and realization.* (Emphasis supplied.)

To my mind such a wide object must include banking business. It might well be that the articles of association of the Societe was changed at its EGM on 27 May 1974 but the Societe most probably did so *ex abundanti cautela* [from excess of caution] and merely to put its object in greater clarity. At any rate the purported copy of the minutes of the Societe's EGM held on 27 May 1974 is to my mind inadmissible as it is only a photostat copy and it was translated from French into English without certifying that the translator was an authorized translator. Furthermore the minutes was not even signed by the chairman and the secretary — the spaces for their respective signatures were left blank. In addition the first respondent also produced a copy of the purported registration of the Banque De L'Indochine in Paris (see exh 'LKH-15' annexed to encl 16) and claimed that the registration was only carried out on 12 July 1974. Counsel therefore argued that the Societe could not have complied with s 3(2)(a) of the Banking Act 1973 as the new Banque De L'Indochine had not been registered on 31 May 1974. Upon a closer scrutiny of the said registration document I notice that it was stated therein 'Registration date: 26 November 1973' indicating that the said new banque was registered in Paris on that date in anticipation of the dissolution of the old Banque De L'Indochine on 31 May 1974. All the contentions of the counsel are to my mind hopelessly unsound.

The final line of attack of counsel for the first respondent was that since the ROC did not register the change of name of the Societe to the new Banque De L'Indochine until 2 July 1975 the Minister, in issuing the banking licence to the said banque on 22 May 1974, was in violation of s 22(1) and (2) of the Companies Act 1965 which reads:

22(1) Except with the consent of the Minister, a company shall not be registered by a name that, in the opinion of the Registrar, is undesirable or is a name, or a name of a kind, that the Minister has directed the Registrar not to accept for registration.

(2) The Minister shall cause a direction given by him under subsection (1) to be published in the Gazette.

It was also contended that in issuing the said banking licence the Minister of Finance violated the provisions of the Gazette Notification No 1484 of 14 April 1966 which empowered only the then Minister of Commerce and Trade to direct the ROC not to register, inter alia, any company that carried with it the name bearing the words 'bank', 'banker', etc without the approval of the said Minister. In raising such a contention it appeared to me that counsel was under a misapprehension that until and unless the Minister of Commerce and Trade had given his approval, the Societe could not carry on banking business. If that be the basis of his contention he is wrong simply because s 22(1) and (2) of the Companies Act 1965 and Gazette Notification No 1484 of 1966 merely empowered the Minister of Commerce and Trade to disallow the ROC to register a company having the name bearing the words 'bank', 'banker' etc. The two subsections and the gazette notification did not empower the said Minister to forbid any corporation which did not have a banking licence to use the word bank and to carry on banking business. The power to do so is conferred on the Minister of Finance pursuant to s 9(1)(a) of the Banking Act 1973 and I need only to cite the relevant provisions of that section:

9(1) Except with the consent in writing of the Minister —

(a) a person or body of persons not being a licensed bank shall not assume or use in relation to the business or any part of the business carried on by the person or body of persons the word 'bank' or any of its derivatives or any word indicating the carrying on of banking business, either in National Language or in English or in any other language.

In issuing the banking licence bearing the name of the new Banque De L'Indochine to the Societe it is clear the prohibition under s 9(1)(a) would no longer apply. That being so the Minister of Finance had not in any way violated any provisions of the Companies Act 1965 or the Banking Act 1973 for he had the power under s 3(1) of the latter Act to issue a banking licence to the Societe to carry out banking business.

As I have found that the Societe had been issued with a valid banking licence to carry out banking business under the name of the new Banque De L'Indochine, the first respondent cannot now be heard to say that the debenture created by it in favour of the original Banque De L'Indochine had not been properly transferred to the new Banque De L'Indochine. The first respondent at any rate is estopped from raising the issue particularly since he had entered into an agreement with the Societe to transfer the debenture to the said banque and furthermore it continued to deal with the new Banque De L'Indochine to get loans from the said banque on the strength of the debenture. If an authority is necessary I would refer to the

case of *Amalgamated Investment & Property Co (in liq) v Texas Commerce International Bank*,[2] which case was brought to my attention by counsel for the applicants.

Turning to the incorporation of Banque De L'Indochine Et De Suez (hereinafter referred to as 'Banque Indosuez'), the first respondent and its counsel again firstly contended that as Banque Indosuez had failed to comply with s 3(2) of the Banking Act 1973, the banking licence issued to it on 1 October 1975 was null and void. To obviate repeating myself, I need only to say that the reasons as stated earlier in my rejection of the first respondent's contention that the banking licence issued to the Societe was invalid apply mutatis mutandis in my rejection of the first respondent's contention against the banking licence issued to Banque Indosuez. Moreover it was through the change of name on that part of the new Banque De L'Indochine to Banque Indosuez that the latter banque was created. There was no change of the constitution or the financial set-up of Banque Indosuez in the process of the alteration of name. Hence the entity of both banque was the same and s 24 of the Banking Act 1973 would not apply. Secondly, it was also contended that as Banque Indosuez had surrendered its banking licence on 1 October 1982 it must cease to carry on banking business. Counsel for the first respondent therefore went on to argue that from 1 October 1982 till 1 April 1985 (a period of 30 months) Banque Indosuez was holding the banking securities of its customers without a banking licence while its associate company the Malaysian French Bank Bhd was doing business with the same customers. Under the circumstances it was argued that Banque Indosuez was doing banking business by proxy! Counsel relied on the case of *Koh Kim Chai v Asia Commercial Banking Corp Ltd*[3] to support his contention. That Privy Council case is of no help to the first respondent. Indeed it was held in that case that 'even if the security was taken in Malaysia, that was not contrary to s 3(1) of the Banking Act 1973'. In other words, the law Lords of the Privy Council implicitly held that the taking of security in itself does not amount to carrying on 'banking business' within the definition of banking business in s 2 of the Banking Act 1973. In the present case Banque Indosuez did not even take any security on or after it had surrendered its banking licence — it merely retained the securities of its customers (including the debenture created by the first respondent) in anticipation of transferring them to the Malaysian French Bank Bhd. To say that Banque Indosuez was doing banking business by proxy through the Malaysian French Bank Bhd is preposterous for the Malaysian French Bank Bhd had and still has a valid banking licence and it was carrying out banking business for its own benefit. The fact that the first respondent was dealing with the said bank and taking loans from it on the strength of the debenture could not be construed as if the said bank was merely a vehicle for Banque Indosuez to carry on banking business simply because the first respondent had on its own volition subsequently entered into an agreement with the said bank on 1 April 1985 (see exh 'A-13' annexed to encl 6 in the affidavit of Lee Peng Seng) whereby it was agreed that the Malaysian French Bank Bhd was to take a transfer from Banque Indosuez of, inter alia, the existing security of the first respondent compris-

ing the debenture of 11 March 1971 and certain charges of the first respondent's lands. Under the circumstances the second contention of the first respondent must also be rejected. A

Turning to the establishment of the first applicant (hereinafter referred to as 'MFBB' abbreviation for Malaysian French Bank Bhd unless otherwise specified) as a bank to carry out banking business, counsel for the first respondent contended that since the intention of the creation of MFBB was to take over the assets and liabilities of Banque Indosuez, it was incumbent on MFBB to produce evidence that it had entered into an agreement with the latter banque and also obtained all the essential prerequisites such as FIC and CIC approval before 1 October 1982, the date MFBB commenced banking business, before it could meet the requirements of s 3(2)(a), (b), (c) and sub-ss (3) and (4) of s 3 of the Banking Act 1973. It was also incumbent on Bank Negara and the Minister of Finance to ensure that the aforementioned acts had been carried out before they could consider and process an application for a banking licence made by MFBB. In the instant case, so said counsel, MFBB had jumped the gun and put the cart before the horse, by obtaining a banking licence and commencing banking business on 1 October 1982 when only on 10 December 1982 did it execute an agreement with Banque Indosuez — a lapse of 70 days. Hence MFBB was doing banking business on 1 October 1982 with all the customers of Banque Indosuez without a valid licence or legal capacity. It must follow therefore that MFBB could not have legally obtained a transfer of the debenture because of the above illegality, and likewise the amount owing by Joo Seng Rubber Co Sdn Bhd (the first respondent) was void and irrecoverable because of the illegality. To my mind the line of argument of counsel is only full of sound and fury signifying nothing. I say so because in the first place there is no provision in the Banking Act 1973 to prohibit any corporation to apply for a banking licence. Whether it would succeed in getting the licence is quite a different matter. Hence there is nothing wrong for MFBB to apply for a licence in October 1982. The agreement to take over the assets and liabilities of Banque De L'Indochine Et De Suez was a private arrangement between the said banque and MFBB. The fact that the said agreement did not come into existence until 10 December 1982 has nothing to do with the application of MFBB's application for a banking licence when the agreement was a matter inter se MFBB and Banque Indosuez only. It is true that the purpose of establishing MFBB was to take over the banking business of Banque Indosuez but that could not prevent MFBB from applying for a banking licence on its own rights and, if its application was successful, to carry out banking business on its own rights pending the finalization of the taking over agreement with Banque Indosuez. In the second place the Minister of Finance had been given full power to issue or reject an application for a licence. There were only three matters under the Banking Act 1973 which the Minister of Finance had to observe in dealing with an application for a licence, namely (i) the applicant must have capital funds unimpaired by losses or otherwise of not less than $2m pursuant to s 5 of the said Act, (ii) the applicant must not be owned or controlled by a foreign government pursuant to s 6 of the said Act and (iii) the applicant was in a position to operate the banking business in

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compliance with the provisions of the said Act or the regulations made thereunder. As there is no evidence to show that MFBB had infringed the provisions of ss 5 and 6 of the Act or that it was incapable of operating the bank in compliance with the provisions of the Act and the regulations made thereunder, it is not within the province of the first respondent to question the exercise of the discretion of the Minister of Finance in issuing the banking licence to MFBB. The banking licence issued to MFBB was and still is a valid licence as confirmed by the letter of Bank Negara dated 28 September 1990 which I have reproduced earlier.

As regards the capacity of MFBB to deal with the customers of Banque Indosuez, one must bear in mind that MFBB was at all material times operating a bank which is fully licenced to do so. As a bank it could do business with anyone more so with the customers of Banque Indosuez which had since ceased to carry on banking business. The first respondent cannot now complain that MFBB at the material time had no legal capacity to do banking business with it or that MFBB had no right to accept the transfer of the debenture created by it since it was the first respondent who on its own volition applied for and accepted loans from MFBB on the strength of the agreement executed between the first respondent and MFBB on 1 April 1985 (see exh 'A-13' annexed to encl 6 in the affidavit of Lee Peng Seng). Clause 2 of the said agreement is important as it provides:

> In consideration of MFBB granting and extending to the customer the facilities referred to in cl 1 hereof the customer hereby:
>
> (a) agrees to MFBB taking a transfer from banque of the existing security;
> (b) agrees and confirms that the existing security when transferred to MFBB shall be security to MFBB:
>
> (i) for all moneys owing by the customer on his account or accounts with banque on the closing date and transferred to the customer's new account or accounts with MFBB as of the effective date;
> (ii) further advances made on the customer's account or accounts with MFBB from the effective date to the date hereof and intended to be secured by the existing security;
> (iii) further advances which may be advanced by MFBB to the customer on his account or accounts with MFBB after the date hereof and intended to be secured by the existing security.

The security mentioned in cl 2 included the debenture of 11 March 1971 and the several charges of lands of the first respondent to the new Banque De L'Indochine as well as to Banque Indosuez. Furthermore in executing the agreement between Banque Indosuez and MFBB on 10 December 1982 whereby Banque Indosuez transferred all its assets and liabilities to MFBB it was made with retrospective effect ie with effect from 1 October 1982. Under the circumstances I am not prepared to accept the aforesaid contentions of counsel concerning the validity of the banking licence issued to MFBB and its legal capacity to do banking business with the customers of Banque Indosuez. I further hold that the debenture of the first respondent was properly and validly transferred to MFBB and the loans granted by MFBB to the first respondent is certainly recoverable by MFBB.

Finally, it is important to note that in an action instituted by MFBB in the commercial division of the Kuala Lumpur High Court Case D1–23–504–88 against the first respondent and five others, judgment had been obtained against the first respondent and the fourth defendant who were directed to pay MFBB the sum of $10,130,349.38 with interest and another sum of $960,000. This judgment precluded the first respondent from alleging that the loans taken by it from MFBB is not recoverable.

For the above reasons, I hold that the appointment of receivers and managers of the first respondent company is perfectly legitimate and legal by virtue of the debenture created by the first respondent on 11 March 1971 and which had been transferred to MFBB. I also grant an order in terms of the application of the first applicant, namely, Malaysian French Bank Bhd, made by way of this originating summons. The first respondent is ordered to pay the costs of the proceedings.

Application allowed.

Reported by Wong Kian Kheong